Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1619

JAMES C. MOSSER,

Petitioner,

v.

WHITE-WELD & COMPANY, INCORPORATED,

Respondent

RESPONDENT WHITE-WELD & COMPANY, INCORPORATED'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Respondent White-Weld & Company, Incorporated respectfully submits its response to the application for writ of certiorari to the Supreme Court of Texas.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because (i) the few courts (including the court below) which have considered the issues raised by petitioner have all upheld the arbitration clause in question, (ii) such issues

have never been considered by a Federal court of appeals, and (iii) the policy of the New York Stock Exchange to require arbitration of disputes between member firms and their registered representatives has worked well and should not be abrogated.

ARGUMENT

THE COURTS HAVE UNIFORMLY UPHELD THE ARBITRATION CLAUSE IN QUESTION

Petitioner's argument that the arbitration clause in question is a contract of adhesion was fully considered and rejected in *Rust v. Drexel Firestone, Inc.*, 352 F. Supp. 715 (S.D.N.Y. 1973). In *Katz v. Shearson Haden Stone, Inc.*, 438 F.Supp. 637 (S.D.N.Y. 1977), *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. District Court*, 190 Colo. 239, 545 P.2d 1035 (1976), and in this case, the courts have deferred to *Rust's* exposition in rejecting the "adhesion" argument. The adhesion argument was also rejected in *Frame v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App.3d 672, 97 Cal. Rptr. 811 (1971) and in *Ware v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 24 Cal. App.3d 35, 100 Cal. Rptr. 791 *aff'd* 414 U.S. 117 (1973). Petitioner adds nothing to the argument which merits the attention of this Court.

Although broker-dealers have attempted to avoid the arbitration clause in question on numerous grounds other than adhesion, both state and federal courts have always found it enforceable.[1] *Drayer v. Krasner*, 572 F.2d 348 (2d

[1]In *Ayres v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532 (3d Cir. 1976) *cert. denied*, 429 U.S. 852 (1976) and *Ware, supra*, the courts found the arbitration clause in question enforceable *per se*. In *Ayres, supra*, the validity of the arbitration clause in an employment dispute was recognized but the 10b-5 dispute in question there was held to "fall outside the perimeter of the rule," *i.e.* Rule 347(b), N.Y.S.E. Rules, which requires arbitration of employee disputes. 538 F.2d at 535. In *Ware, supra*, a California statute requiring litigation of wage disputes was held to supercede the arbitration clause in question. In *Wertheim & Co., Inc. v. Halpert*, 65 A.D.2d 724, 411 N.Y.S.2d 11 (1978) *aff'd* 48 N.Y.2d 681, 421 N.Y.S.2d 876 (1979), a Title VII sex-discrimination claim was not required to be arbitrated.

Cir. 1978) *cert. denied*, 436 U.S. 948 (1978); *Stokes v. Merrill, Lynch, Pierce, Fenner & Smith*, 523 F.2d 433 (6th Cir. 1975); *Dickstein v. duPont*, 443 F.2d 283 (1st Cir. 1971); *Fox v. Merrill, Lynch & Co., Inc.*, 453 F.Supp. 561 (S.D.N.Y. 1978), *Legg, Mason & Co., Inc. v. Mackall & Coe, Inc.*, 351 F.Supp. 1367 (D.D.C. 1972); *Youmans v District Court*, ... Colo. ....., 589 P.2d 487 (1979); *Crawford v. Merrill, Lynch, Pierce Fenner & Smith, Inc.*, 35 N.Y.2d 291, 261 N.Y.S.2d 140, 319 N.E.2d 408 (1974); *Moritz v. Frances I. duPont & Co.*, 291 Minn. 523, 189 N.W.2d 487 (1971); *Mitchum, Jones & Templeton, Inc. v. Chronis*, 72 Cal. App.3d 596, 140 Cal. Rptr. 160 (1977); *Lewsadder v. Mitchum, Jones & Templeton, Inc.*, 36 Cal. App.3d 255, 111 Cal. Rptr. 405 (1973).

THE ISSUES RAISED BY PETITIONER HAVE NEVER BEEN CONSIDERED BY A FEDERAL COURT OF APPEALS

There is no conflict within the federal courts of appeals concerning the questions raised by petitioner for the simple reason that no federal court of appeals has considered these issues. It would be premature therefore for this Court to consider the issues even if they could be described as significant.

THE NEW YORK STOCK EXCHANGE SHOULD BE PERMITTED TO REQUIRE ARBITRATION OF DISPUTES BETWEEN MEMBER FIRMS AND THEIR REGISTERED REPRESENTATIVES

The New York Stock Exchange (the "NYSE") requires that all registered representatives of all member firms execute a standard form of employment contract with the member firm by which he is employed. 2 NYSE Guide (CCH) page 3591. Such contract contains the arbitration clause here in question.[2] The court in *Rust, supra,* stated the policy considerations which led the NYSE in the exercise of the self-regulatory power vested in it by federal securities laws to establish a system of arbitration of disputes arising from NYSE activities. Respondent will not restate the advantages of arbitration, which are well known to the Court. *See Wilko v. Swan,* 346 U.S. 427 (1953). Suffice it to say that the NYSE system of arbitration has suffered few judicial attacks despite the vast numbers of broker-dealers that petitioner shows to be within its reach. Petition for Writ of Certiorari at p. 9. Arbitration has worked well for the NYSE and its member firms and should not be undermined by judicial recognition of the contentions advanced by petitioner.

PRAYER

In light of the fact that the issues raised by petitioner have been uniformly rejected by the few courts that have considered them; in light of the fact that no federal court of appeals has been confronted with the issues raised by petitioner; and in light of the fact that arbitration has

[2]Though petitioner was not required by NYSE rule to be registered with the NYSE since he dealt in exempt securities – government bonds – White-Weld as a matter of firm policy required all its salesmen to register and to execute the standard form of contract.

served the NYSE well in the exercise of its self-regulatory powers, respondent prays that the Petition for Writ of Certiorari to the Supreme Court of Texas filed by James C. Mosser be denied.

Respectfully submitted,

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By JOHN A. MARTIN

CERTIFICATE OF SERVICE

I, John Andrew Martin, hereby certify that three (3) true and correct copies of the foregoing have been on this the 30th day of April, 1980, deposited in the United States Mail, first class, postage prepaid, to David Watkins, 1212 Mockingbird Tower East, 1341 West Mockingbird Lane, Dallas, Texas 74247.

All parties required to be served have been served.

JOHN A. MARTIN

JOHN ANDREW MARTIN